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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DAMEN LOVELL SMITH,<br><br>Defendant and Appellant. | 2d Crim. No. B205522<br>(Super. Ct. No. YA068878)<br>(Los Angeles County) |

Damen Lovell Smith appeals the judgment entered after a jury convicted him on two counts of identity theft (Pen. Code, § 530.5, subd. (a)),[1] second degree commercial burglary (§ 459), forgery (§ 470, subd. (a)), and receiving stolen property (§ 496, subd. (a)). The trial court sentenced him to a total prison term of four years four months. He contends (1) the evidence is insufficient to support his convictions; (2) the court erred in instructing the jury with CALCRIM No. 362; and (3) the court erred in admitting certain expert testimony. We affirm.

FACTS

Smith met codefendant Kimberly Eaton in early 2007, when he approached

[1] All further undesignated statutory references are to the Penal Code.

her on the street and asked for her telephone number.[2] On July 19, 2007, Smith gave Kimberly Eaton $40 and told her to open an account at Bank of America. Smith explained that doing so would allow her to cash a check he was going to give her. Smith, Eaton and Denault later met with Smith's brother, who gave Eaton a check for $8,800. Smith then drove Eaton to several banks outside the City of Los Angeles and told her to try to cash the check. Eaton's attempts to cash the check were unsuccessful.

Smith and Denault knew each other as tenants in the same apartment building. Sometime before July 23, 2007, Denault opened an account at Bank of America pursuant to Smith's instruction with money he had given her. On one occasion, Denault successfully cashed a check Smith had given her and gave him the money as soon as she walked out of the bank. Smith gave her back $400, and said his uncle made all decisions as to how money they obtained was to be divided. On another occasion, Smith gave Denault a check made out to her for $6,500, which was purportedly signed by Jose Calienes. Smith then drove Denault to four or five banks, where she tried but failed to cash the check. Smith subsequently took the check back from Denault.

Jose Calienes and his wife Tomasa had personal and business accounts at Bank of America. On the morning of July 19, 2007, Tomasa[3] called their office from home and was forwarded to a recording of rap music. When Tomasa called her office on another line, her secretary told her she had not heard the telephone ring. Tomasa called the telephone company and was told that someone had ordered call forwarding. Tomasa told the company's representative to cancel the call forwarding.

The same day, Jose and Tomasa saw an African-American man "hanging around" outside their office. When Jose asked the man if he could help him, the man said he was "taking a break" and then left. That afternoon, Tomasa answered a telephone call

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[2] Eaton and Smith's other codefendant Shari Denault entered plea agreements a week prior to Smith's trial and testified for the prosecution.

[3] We refer to the Calieneses by their first names for ease of reference, and intend no disrespect.

from a man who claimed to work for the telephone company. The man told Tomasa not to answer the telephone for the next hour because the telephone company would be checking the telephone line in response to her complaint. During that hour, the telephone rang four or five times.

The next morning, Tomasa tried to call her office from Lake Havasu and was forwarded to the rap music again. Tomasa called her secretary on the other line and told her to call the telephone company. When Tomasa's call was once again forwarded to the rap music on July 23, she called the telephone company again and was advised to call her bank immediately. The bank informed her that $17,000 had been transferred from her business account to her personal account without her or Jose's authorization. She also learned that an unauthorized check for $6,800 had been paid to a Jason Winston on July 19, and that someone had changed all of her personal information. In light of this information, the accounts were immediately closed.

On July 23, Eaton agreed to cash another check for Smith. Smith drove Eaton and Denault to a mall, where he bought Eaton a new outfit. Smith told her she needed to look "presentable" if she was going to cash the $6,500 check he was going to give her. As Smith drove the women to Gardena, his uncle spoke to him by cell phone and told him where to go. Smith pulled into a gas station, where a man he identified as his brother handed him a check from the account of Al and Severa Sison that was made out to Eaton for $6,500. Smith then drove to a Bank of America, where Eaton presented the check to a teller. After Eaton endorsed the check and provided identification, the teller asked her to have a seat while she verified the check. The teller took the check to her supervisor, Lorena Luna, for verification. Luna noticed that Eaton's account had been opened only a few days earlier, then discovered that in the past three days almost $40,000 had been withdrawn from the Sisons' account at banks in Diamond Bar, Chino Hills, Ontario, Huntington Beach, Watts, and Westminster. Luna attempted to contact the Sisons to verify that the check was legitimate, but was told by the woman who answered the telephone that they were out of town. Luna explained that she was calling from a

bank regarding a check and asked if there was a number where she could reach the Sisons, but the woman said she could not give her that information and hung up. After Luna compared the signature on the check with the signature on another check from the Sisons' account and saw that they appeared to be different, she called the police.

While Eaton was waiting in the lobby, appellant "chirped" her on her cell phone and asked what was taking so long. Eaton responded that the teller was verifying the check. Smith continued chirping Eaton with the same message, but she did not respond again. Gardena Police Officer Raul Alarcon then approached Eaton and asked her why she was there. Eaton said she was there to cash a check and that a man and woman were waiting for her outside in a small blue car. Officer Alarcon arrested Eaton and alerted other officers about the occupants of the car. Eaton was searched and found in possession of three blank Bank of America checks and a cell phone.

Officer Luis Villanueva and his partner responded to Officer Alarcon's broadcast and approached the car in which Smith and Denault were sitting. Smith, who was sitting in the driver's seat, appeared to be doing something with his hands on his lap. The officer observed a cell phone sitting on Smith's right thigh. Smith and Denault were arrested. The check allegedly signed by Jose Calienes that Denault had tried to cash was subsequently found inside the car. Jose later told the police that he had never seen the check and that it was different from the checks he used.

On July 24, 2007, Smith was interviewed by Detectives Gubernat and Fox. A DVD of the interview was played for the jury. Smith was shown a picture of Eaton and said he had never seen her before. When Detective Gubernat told Smith that Smith's chirp number was on Eaton's phone, Smith admitted knowing her but claimed they were not good friends. Smith told the detective "these bitches got me all fucked up and I don't have nothing to do with this. This is my girlfriend."

Detective Gubernat testified at trial as an expert on bank fraud schemes, and explained how an account takeover typically occurs. After a suspect obtains an account holder's personal information, he contacts the bank representing himself as the

account holder, requests an address and telephone number change, and obtains overnight delivery of checks imprinted with the new information. Several of the fraudulent checks are forged and given to a "handler," who passes each check off to a "runner." The runner, who may have been recruited by the handler, is typically female and is sometimes bought clothing to make her appear more presentable. When the runner presents a check for cashing, the bank calls the account holder's "new" telephone number, which is actually the suspect's cell phone number. The suspect then answers the telephone, identifies himself as the account holder, and "verifies" that the check is authentic. The handler typically waits for the runner in the bank parking lot, and often communicates with her by cell phone while she is in the bank to make sure everything is running smoothly. After the check is cashed, the runner gives the money to the handler, who then gives her back some of the money as payment for her participation in the scheme. In Detective Gubernat's opinion, Smith was a handler and Eaton and Denault were runners.

## DISCUSSION

### I.

### *Sufficiency of the Evidence-Corroboration of Accomplice Testimony*

The jury was instructed that Eaton and Denault were Smith's accomplices as a matter of law. Smith contends his convictions must be reversed because the evidence is insufficient to corroborate the testimony of both women. We disagree.

A conviction based on the testimony of an accomplice is prohibited unless the testimony is corroborated by other evidence that tends to connect the defendant with the commission of the crime. (§ 1111; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 215.) Corroboration may be established entirely by circumstantial evidence that may be slight or entitled to little consideration by itself. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.) ""Corroborating evidence 'must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.' [Citation.]"' [Citations.] In this regard, 'the prosecution must

produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]' [Citation.] '"Corroborating evidence is sufficient if it substantiates enough of the accomplice's testimony to establish his credibility [citation omitted]."' [Citation.]" (*Ibid.*) The jury's finding of corroboration may not be disturbed on appeal unless the corroborating evidence was erroneously admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25.)

We conclude there was substantial corroborative evidence connecting Smith to the crimes he was convicted of committing. Evidence that places a defendant with coconspirators on the day of a charged offense, and which shows he made false or misleading statements to the police after the crime, may be sufficient to corroborate an accomplice's testimony. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1013.) Smith eventually admitted that he drove Eaton to the bank where she attempted to cash the fraudulent check, and he was arrested in his car in the bank's parking lot shortly after the crime was intercepted. (See, e.g., *People v. Lewis* (1934) 136 Cal.App. 405, 408-409 [testimony that defendant was seen dropping off an accomplice at the scene of the burglary was sufficient to corroborate the accomplice's testimony regarding the defendant's participation in the crime].) Smith also falsely claimed that he did not know Eaton, and only changed his story when confronted with the fact that his chirp number was on her cell phone. His initial attempt to conceal his connection to the crime in this manner gives rise to a reasonable inference that he actually participated in it. (*Vu, supra,* at p. 1022.) This evidence is sufficient to corroborate Eaton's testimony regarding Smith's involvement in the theft of the Sisons' identities, the burglary, and forgery of the check that Eaton attempted to cash on July 23. Eaton and Denault's testimony regarding the theft of the Calieneses' identity and the receipt of property stolen from them is corroborated by the fact that the stolen property (i.e., the $6,500 check that Denault gave back to Smith after she was unable to cash it) was found in his car at the time of his

arrest. (See *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1304.) Because this independent evidence tends to connect Smith to crimes of which he was convicted, it is sufficient to corroborate the testimony of his accomplices.

II.

*CALCRIM No. 362*

Smith contends the court erred in instructing the jury with CALCRIM No. 362, which provides as follows: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." CALCRIM No. 362 is the successor to CALJIC No. 2.03, which provided as follows: "If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." We conclude that the instruction was properly given.

"The California Supreme Court has consistently upheld CALJIC No. 2.03 against various and sundry attacks." (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1103-1104, fn. 3, citing as examples *People v. Nakahara* (2003) 30 Cal.4th 705, 713, and *People v. Barnwell* (2007) 41 Cal.4th 1038, 1057.) Recently, the court found no distinction between CALJIC No. 2.03 and CALCRIM No. 362 in noting it had "repeatedly rejected arguments attacking the instruction [citations] . . . ." (*People v. Howard* (2008) 42 Cal.4th 1000, 1024-1025.) Indeed, the court has recognized that "[t]he inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely

to indulge even without an instruction." (*People v. Holloway* (2004) 33 Cal.4th 96, 142 [addressing CALJIC No. 2.03].)

CALCRIM No. 362 is properly given when "there exists evidence that defendant prefabricated a story to explain his conduct." (*People v. Williams* (1995) 33 Cal.App.4th 467, 478 [addressing CALJIC No. 2.03].) "Deliberately false statements to the police about matters that are within an arrestee's knowledge and materially relate to his or her guilt or innocence have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances. [Citation.]" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1167-1168.) Here, Smith initially told the police that he did not know Eaton and had "never seen her before." Smith subsequently admitted that this statement was false. This is precisely the type of evidence from which a jury might infer a consciousness of guilt. (*Ibid.*)

Smith's opening brief makes no mention of his statement that he did not know Eaton. While he acknowledges it in his reply brief, he asserts that the statement "related only to the attempts to cash the check at the Bank of America and not the possession of the Calienes' check." He fails to appreciate, however, that his participation in the theft of the Calieneses' identity and possession of property stolen from them was part of the same overall scheme. In any event, Smith fails to establish prejudicial error. The jury was instructed that Smith's guilt could not be proved solely by evidence he made a false or misleading statement. Moreover, the evidence of Smith's guilt of the charged crimes was overwhelming. Because it is not reasonably probable that Smith would have achieved a more favorable verdict had the trial court not instructed with CALCRIM No. 362, any error in giving the instruction was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Rankin* (1992) 9 Cal.App.4th 430, 436 [applying *Watson* standard of review to error in giving CALJIC No. 2.03].)

III.

*Expert Testimony*

Smith argues that the court erred in admitting Detective Gubernat's expert testimony on bank fraud schemes because it amounted to inadmissible "fraud ring profile testimony." We disagree.

"Not all testimony concerning general patterns of criminal activity is 'profile' testimony." (*People v. Lopez* (1994) 21 Cal.App.4th 1551, 1555.) "Profile" evidence is defined as "a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) "By contrast, background testimony is not 'profile' evidence and does not specifically address the guilt or innocence of the defendant. Instead, it enables the jury to understand other evidence that does address guilt or innocence." (*Lopez, supra*, at p. 1556.) For example, courts have long recognized that experts can assist juries in understanding certain aspects of criminal behavior, which may include descriptions of typical methods in which certain crimes are committed. (See, e.g., *People v. Brown* (1981) 116 Cal.App.3d 820, 828 [expert testimony identifying a "runner" as a middleman between a seller and a buyer of drugs]; *People v. Clay* (1964) 227 Cal.App.2d 87, 93, 95-99 [testimony regarding clandestine form of theft known as "till tapping"]; *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1216-1217, 1226-1228 [testimony on methods employed by Colombian cocaine distribution rings].) Moreover, profile evidence need not necessarily be excluded. It is only inadmissible "when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt." (*People v. Smith* (2005) 35 Cal.4th 334, 358.)

In this case, we need not decide whether Detective Gubernat's testimony qualifies as background or profile evidence because the behavior the detective described is not as consistent with innocence as it is with guilt. (Compare *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072 [expert identified a typical Northern San Diego County tar heroin dealer described as an Hispanic male adult]; *People v. Martinez* (1992)

10 Cal.App.4th 1001, 1006 [expert testified that a typical person involved in an auto theft ring carries false documents and drives a certain type of car on a particular interstate route at a certain time of day].) The detective's testimony described behavior by an individual who recruits women for the purpose of cashing a check he knows to be forged, then assists them in carrying out the crime. While the act of driving an individual to the bank and waiting for them in the parking lot may be innocuous standing by itself, the conduct did not occur in isolation. The overall pattern of behavior that Detective Gubernat attributed to a "handler" is not consistent with innocence at all, much less consistent with both innocence and guilt.

In any event, any error in admitting the evidence was harmless. Eaton and Denault testified to all of the facts that were necessary to sustain Smith's convictions, and that testimony was corroborated by independent evidence. Accordingly, Smith fails to demonstrate a reasonable probability that the verdict would have been different had the evidence been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *People v. Derello* (1989) 211 Cal.App.3d 414, 426 [applying *Watson* standard of harmless error review to claim that profile evidence was erroneously admitted].)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James Brandlin, Judge

Superior Court County of Los Angeles

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Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Jonathan J. Kline, Deputy Attorney General, for Plaintiff and Respondent.